88-851

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THOMAS HENRY PIDCOCK,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR
THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are an accused's Fourth Amendment rights to be free from unreasonable searches and seizures violated by a warrantless search and seizure when probable cause exists to obtain a warrant, but the police are performing a "civil function"?

2. If such a "civil function" exemption exists, is a police search for identification a "civil function" falling within this exception?

PARTIES

All parties to this case are named in the case caption.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	1
Constitutional Provisions Involved	2
Statement of the Case	2
Facts	3
Argument	8
Conclusion	12
Appendix	
Opinion of the Supreme Court of the State of Oregon	A-1
Order Denying Reconsideration	A-8
Opinion of the Court of Appeals of the State of Oregon	A-9

TABLE OF AUTHORITIES

Page

CONSTITUTION OF THE UNITED STATES OF AMERICA

Fourth Amendment 2

OREGON CONSTITUTION

Article I, Section 9 9

CASES

Cady v. Dombrowski, 413 US 433, 93 S Ct 2523, 37 Lawyers Ed2d 705 (1973). . 10

Katz v. United States, 389 US 347, 88 S Ct 507, 19 Lawyers Ed2d 576 (1967) . 10

State v. Pidcock, 306 Or 335 (1988). . . 3

STATUTES

Oregon Revised Statute 98.005 7

FEDERAL STATUTES

28 USC § 1257 (3) 2

OPINION BELOW

An opinion of the Court of Appeals of the State of Oregon was entered on February 10, 1988. Rehearing was requested and denied. The Supreme Court of the State of Oregon accepted review of this case on May 8, 1988, and entered its opinion reversing the Court of Appeals, but affirming the trial court's order denying the Motion to Suppress on August 2, 1988. Rehearing was requested, and denied on September 20, 1988.

JURISDICTIONAL STATEMENT

Judgment was entered by the Court of Appeals on February 10, 1988, the Supreme Court accepted review on May 3, 1988. Judgment was entered by the Supreme Court of the State of Oregon on August 2, 1988. Petitioner's timely petition for rehearing was denied on Sept. 20, 1988. A copy of the Order Denying Rehearing is attached as Appendix A-8. This Court has jurisdiction to review the

judgment of the Court of Appeals pursuant to 28 USC § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States: Fourth Amendment.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a criminal case in which the Petitioner was charged with two counts of unlawful possession of a controlled substance, methamphetamine and cocaine. He was also charged with unlawful possession of a weapon. The Petitioner filed a Motion to Suppress, and proceeded to trial on stipulated facts. The trial court entered its ruling as follows:

> "However, it is going to be the finding in my ruling that I did not determine reasonable expectancy of privacy to exist in the article or within those containers within the article. I am not going to comment further upon these comments. It will be the ruling that the motion be denied." (TR 56)

The defendant was then convicted of the two counts of unlawful possession of a controlled substance, and was acquitted on the unlawful possession of a weapon charge. He appealed the conviction to the Court of Appeals of the State of Oregon, and further to the Supreme Court of the State of Oregon. The Supreme Court stated in its opinion as follows:

> "The sheriff did not obtain a warrant for the search of the briefcase or its contents. Defendant moved to suppress the briefcase and its contents, relying on Article I, Section 9, of the Oregon Constitution, and the Federal Fourth Amendment." (State v. Pidcock, 306 Or 335 (1988)).

FACTS

The Court of Appeals recited the stipulated facts of the parties as follows:

"On February 14, 1985, a Mrs. Joll and her daughter Mary were driving toward their residence, just off Crow Road, in Lane County. As they approached the mailbox adjacent to their driveway, they observed what appeared to be a pillow or pillowcase lying near the mailbox. They stopped, and Mary examined the pillowcase and found a black leather briefcase.

They took the briefcase to their house and spent several minutes trying to get it open. There was no identification on the exterior. They then called the sheriff and reported finding the briefcase. They were told that ordinarily the sheriff would not respond to someone's finding lost property. Joll indicated that this particular briefcase appeared to be somewhat unusual and that it was quite nice and new leather, with combination tumbler locks. It was locked at the time, and there was something heavy inside that was sliding around.

"On February 15, 1985, at about 8:30 a.m., Deputy Larson went to the Joll residence and examined the briefcase briefly. He turned the tumblers to zero, which opened the case. Not knowing what was in it, and because there was some type of heavy object sliding around in it, he cracked it open an inch or two so that he could peer inside without fully opening the lid. He observed a large stack of money with a

appeared to be an automatic or semi-automatic handgun, a baggie that appeared to contain marijuana, manila envelopes and some other small items which he could not identify. There appeared to be a wire extending from inside the briefcase to its top.

"Because of the wire, Larson called the Eugene Police Department bomb squad to have it examine the briefcase. He thought that it might be booby-trapped. The bomb squad took the briefcase outside the Joll residence and x-rayed it. Readily apparent were a handgun, what appeared to be an extra automatic clip with ammunition, eyeglasses and other indistinct items. They were not able to determine from the x-rays whether there was an explosive devise inside. The briefcase was then opened on one side, and its contents were carefully removed. There were two manila envelopes, one sealed. The glasses were wire-rimmed with a fairly thin black plastic coated substance on the wire, which was the wire Larson had observed. The briefcase was not booby-trapped.

"Late that morning, the briefcase and its contents were taken to the sheriff's office. The manila envelopes were opened and examined. No identification of the owner was found. State Crime Lab technician Bekkedahl tested the substances found in the envelopes and determined that they were cocaine and methamphetamine.

"After the property was returned to the sheriff's office from the crime lab, the money was determined to be about $9,000. Defendant's fingerprints were found on the envelopes. The weapon was a .45-caliber automatic, fully loaded, which appeared to be in working order.

"The sheriff was concerned about the welfare of citizens in the area where the briefcase was found, fearing that someone who had lost it might harass or threaten residents to get it back. Because of that concern, in mid-afternoon of February 15, the news media were invited to come to the sheriff's office for a press conference. On the morning of that day, a telephone call had come to the Eugene

Register-Guard from a person requesting that a classified ad be placed concerning a briefcase lost in the Crow Road area. That afternoon, a second phone call was received from an adult female who indicated that she wanted the classified ad withdrawn. She asked that the bill be sent to "Tom Pidcock" and she gave defendant's address and phone number.

"* * * [B]etween 6 and 6:30 p.m. on St. Valentine's Day, people had been observed in the Crow Road area driving a vehicle slowly up and down the road apparently looking for something. The vehicle was registered to defendant.

"After being advised of the "finders-keepers law," ORS 98.005 et seq, Joll placed an advertisement in the Register-Guard advertising the finding of the briefcase and how it could be obtained. She specifically rented a separate post office box for the sole purposes of responses to her advertisement. Other than junk mail, she received no responses. The Register-Guard published news

stories at least twice between February 16 and February 20 about the briefcase." 89 Or App at 445-47.

If called to testify, the Petitioner would testify that he had no intention of abandoning the briefcase, but he never claimed the briefcase apparently fearing apprehension and self-incrimination.

ARGUMENT

1. A police search without a warrant, when probable cause exists to obtain one, while the police are performing a "civil function" violates the Fourth Amendment of the United States Constitution.

The Supreme Court of the State of Oregon held that:

> "Obviously, the deputies had probable cause to obtain a warrant to open the manila envelopes once they found the weapon, the marijuana, the $9,000. Had the deputies opened the manila envelopes in search of contraband, they would have violated defendant's state and probable constitutional rights."

This decision has created a new exception to the warrant requirements, by holding that if police are performing a "civil function," even

in the face of probable cause sufficient to obtain a warrant, no warrant is required. In other words, the police are free to violate the defendant's federal constitutional rights and those afforded by Article I, Section 9, of the Oregon Constitution, so long as they are pursuing a "non-prosecutorial objective." The Oregon Supreme Court has decided an important question of federal law which should be settled by this Court, and which extends the exceptions to the Fourth Amendment protections afforded an accused beyond the limits of any decision rendered by any opinion of this Court.

The Oregon Supreme Court holds that the mere seeking of identification is sufficient to come within this new exception. But looking for identification is a major criminal investigatory function. And up to the rendering of this opinion, no authority could be found to support the proposition that seeking identification has now somehow been transformed into solely a matter of civil concern, or that it is not a primary or even

secondary goal of criminal investigation.

To hold that the police have a duty to seek identification without the corollary duty to act upon the identification if obtained, serves no useful societal interest and can hardly be construed to be any type of objective, yet alone a non-prosecutorial objective.

Warrantless searches are per se unreasonable. Katz v. United States, 389 US 347, 88 S Ct 507, 19 Lawyers Ed2d 576 (1967). The community caretaker exception is set out in Cady v. Dombrowski, 413 US 433, 93 S Ct 2523, 37 Lawyers Ed2d 705 (1973). It is distinguishable from this case. Dombrowski dealt with the distinction between an automobile and other forms of property. The distinction breaks down in this case, and opens a floodgate to all types of warrantless searches of property. It should be noted that in Dombrowski, the impound procedures were standard police procedures. In this case, the record notes that "ordinarily the sheriff would

not respond to someone's finding lost property."

The mere holding of this court that the seeking of identification is a civil function in the face of an obvious criminal investigation such that the warrant requirements for search and seizure are alleviated, virtually allows the police to search any property without a warrant by proclaiming that they are exercising a "civil function," without identifying what that civil function may be, but certainly they could always claim that they were searching for identification.

What is troubling about this court's decision is that it would seem to suggest that the police can simply ignore evidence of a crime while they are allegedly performing some "civil function." The notion that seeking identification is a civil function and a non-prosecutorial objective is no more persuasive than arguing that the police, not finding any evidence of identification in the envelopes in this case, fingerprinted the

envelopes and their contents in exercise of their "civil function," and that this was not a prosecutorial function. Obviously, the taking of fingerprints is equally helpful in determining the identify of an individual, and in fact, was used to determine the identify of the defendant, and further used to prosecute him. How the Supreme Court of the State of Oregon can distinguish between opening an envelope to search for identification, and then fingerprinting the envelope or its contents in search for identification, and concluding that one is a civil function and the other is not, is difficult to grasp.

CONCLUSION

This writ should be granted to terminate this expansion of warrantless searches by police authorities. This search was blatantly unconstitutional and the precedent threatens to unravel the Fourth Amendment protections to such unreasonable searches and seizures.

Respectfully submitted this 18th day of November, 1988.

Larry R. Roloff
Attorney for Petitioner

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Respondent on Review,

v.

THOMAS HENRY PIDCOCK,
Petitioner on Review.

(CC 10-85-09438; CA A40456; SC S34991)

In Banc

On review from the Court of Appeals.*

Argued and submitted June 8, 1988.

Larry R. Roloff, Eugene, argued the cause and filed the petition for petitioner on review.

Rives Kistler, Assistant Attorney General, Salem, argued the cause for respondent on review.

JONES, J.

The decision of the Court of Appeals and the judgment of the trial court are affirmed.

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* Appeal from Lane County Circuit Court. Pierre Van Ryaselberghe, Judge. 89 Or App 443, 749 P2d 597 (1988).

JONES, J. —

Defendant appealed his convictions on two counts of unlawful possession of a controlled substance, ORS 475.992(4)(b), contending that the trial court erred in denying his motion to suppress evidence. The Court of Appeals affirmed. *State v. Pidcock*, 89 Or App 443, 749 P2d 597 (1988). We affirm the decision of the Court of Appeals.

FACTS

The Court of Appeals recited the stipulated facts of the parties as follows:

> "On February 14, 1985, a Mrs. Joll and her daughter Mary were driving toward their residence, just off Crow Road, in Lane County. As they approached the mailbox adjacent to their driveway, they observed what appeared to be a pillow or pillowcase lying near the mailbox. They stopped, and Mary examined the pillowcase and found a black leather briefcase. They took the briefcase to their house and spent several minutes trying to get it open. There was no identification on the exterior. They then called the sheriff and reported finding the briefcase. They were told that ordinarily the sheriff would not respond to someone's finding lost property. Joll indicated that this particular briefcase appeared to be somewhat unusual and that it was quite nice and new leather, with combination tumbler locks. It was locked at the time, and there was something heavy inside that was sliding around.
>
> "On February 15, 1985, at about 8:30 a.m., Deputy Larson went to the Joll residence and examined the briefcase briefly. He turned the tumblers to zero, which opened the case. Not knowing what was in it, and because there was some type of heavy object sliding around in it, he cracked it open an inch or two so that he could peer inside without fully opening the lid. He observed a large stack of money with a $100 bill on top. He also observed what appeared to be an automatic or semi-automatic handgun, a baggie that appeared to contain marijuana, manila envelopes and some other small items which he could not identify. There appeared to be a wire extending from inside the briefcase to its top.
>
> "Because of the wire, Larson called the Eugene Police Department bomb squad to have it examine the briefcase. He thought that it might be booby-trapped. The bomb squad took the briefcase outside the Joll residence and x-rayed it. Readily apparent were a handgun, what appeared to be an extra automatic clip with ammunition, eyeglasses and other indistinct

items. They were not able to determine from the x-rays whether there was an explosive device inside. The briefcase was then opened on one side, and its contents were carefully removed. There were two manila envelopes, one sealed. The glasses were wire-rimmed with a fairly thin black plastic coated substance on the wire, which was the wire Larson had observed. The briefcase was not booby-trapped.

"Late that morning, the briefcase and its contents were taken to the sheriff's office. The manila envelopes were opened and examined. No identification of the owner was found. State Crime Lab technician Bekkedahl tested the substances found in the envelopes and determined that they were cocaine and methamphetamine.

"After the property was returned to the sheriff's office from the crime lab, the money was determined to be about $9,000. Defendant's fingerprints were found on the envelopes. The weapon was a .45-caliber automatic, fully loaded, which appeared to be in working order.

"The sheriff was concerned about the welfare of citizens in the area where the briefcase was found, fearing that someone who had lost it might harass or threaten residents to get it back. Because of that concern, in mid-afternoon of February 15, the news media were invited to come to the sheriff's office for a press conference. On the morning of that day, a telephone call had come to the *Eugene Register-Guard* from a person requesting that a classified ad be placed concerning a briefcase lost in the Crow Road area. That afternoon, a second phone call was received from an adult female who indicated that she wanted the classified ad withdrawn. She asked that the bill be sent to "Tom Pidcock" and she gave defendant's address and phone number.

"* * * [B]etween 6 and 6:30 p.m. on St. Valentine's Day, people had been observed in the Crow Road area driving a vehicle slowly up and down the road apparently looking for something. The vehicle was registered to defendant.

"After being advised of the "finders-keepers law," ORS 98.005 *et seq*, Joll placed an advertisement in the *Register-Guard* advertising the finding of the briefcase and how it could be obtained. She specifically rented a separate post office box for the sole purpose of responses to her advertisement. Other than junk mail, she received no responses. The *Register-Guard* published news stories at least twice between February 16 and February 20 about the briefcase." 89 Or App at 445-47.

The record establishes that defendant never claimed the briefcase, apparently fearing apprehension.

MOTION TO SUPPRESS

The sheriff did not obtain a warrant for the search of the briefcase or its contents. Defendant moved to suppress the briefcase and its contents, relying on Article I, section 9, of the Oregon Constitution and the federal Fourth Amendment. Defendant argues: (1) The police had no authority to open and search the briefcase; (2) the police had no probable cause to believe that the briefcase contained contraband; and (3) once the police opened the briefcase, they needed a warrant to open and search the manila envelopes. The Court of Appeals rejected these arguments and held that when defendant made no effort to claim or recover the briefcase after he learned the briefcase and contents were in police custody, that defendant "abandoned" the property in a constitutional sense. The Court of Appeals stated: "One who acts to abandon property cannot claim a constitutional violation, even if the act was done to avoid police action." 89 Or App at 448.

We disagree with the Court of Appeals' analysis, although we affirm the result. Defendant did not "abandon" the briefcase until after the deputies had opened the briefcase and opened the envelopes and tested their contents without a warrant. When the deputies opened the briefcase and tested the contents, defendant was still actively attempting to recover that property. Defendant nevertheless loses the motion to suppress, because the deputies were not searching the briefcase or contents for contraband related to any criminal activity. Rather, when the police opened the briefcase and the envelopes, they were simply trying to identify the owner.

Finders of lost property have a statutory duty to attempt to return the property to its owner. When the finder of the property turned it over to law enforcement officers, on the finder's own initiative, the deputies were placed in the position of the finder. ORS 98.005 provides:

> "(1) If any person finds money or goods valued at $25 or more, and if the owner of the money or goods is unknown, such person, within 10 days after the date of the finding, shall give notice of the finding in writing to the county clerk of the county in which the money or goods was found. Within 20 days after the date of the finding, the finder of the money or

goods shall cause to be published in a newspaper of general circulation in the county a notice of the finding once each week for four consecutive weeks. Each such notice shall state the general description of the money or goods found, the name and address of the finder and final date before which such goods may be claimed.

"(2) If no person appears and establishes ownership of the money or goods prior to the expiration of six months after the date of the notice to the county clerk under subsection (1) of this section, the finder shall be the owner of the money or goods."

The statutes concerning lost or misplaced property, taken together, place a burden on the finder of lost property to discover the owner of the property. ORS 98.005 gives the finder a claim to the property if the owner is unknown. If the owner is known, ORS 98.005 does not apply.

Under the facts as determined by the trial court, the sheriff's deputies were simply assisting the finder of the property to ascertain the identity of the owner or to determine if the owner of the briefcase was indeed unknown, as described in ORS 98.005. In doing so, an officer may open the briefcase in an attempt to identify the owner, just as the statute would make it reasonable and proper for the citizen to have done the same act.

The trial court accepted the prosecutor's statement of facts, which included the following:

"The property was taken to the Lane County Sheriff's office sometime late in the morning. The items were * * * taken, I should say not all of the items, but the Manila envelopes were examined to determine whether there was any identification of any kind within the Manila envelopes.

"There had been no identification of items that could identify an owner for this item in the briefcase.

"There are a number of pockets and places in the briefcase where that kind of material might be found. Those were examined, there was none.

"There was a number of other items, which I have not mentioned, in the briefcase, none of which were items of identification sort of material."

Apparently after the deputies opened the manila envelopes, seeking identification, they found plastic baggies

containing white and brownish granular material. The deputies could see, without conducting any search, that these baggies contained substances which they knew from experience probably contained cocaine and methamphetamine. The crime laboratory found that one of the plastic baggies contained cocaine and the other baggie contained methamphetamine.

Defense counsel stipulated to the statement of evidence by the prosecutor, but did comment as follows:

> "There was one statement that [the prosecutor] made, which I would just — I want to clarify. It is a small point, but it is the only one out of everything he said I would even take issue with. And that is, that he did make a statement that the further investigation of the contents were for purposes of determining identification.
>
> "I might differ with him, as a point of argument, as to what they were really doing in connection with the further search into these closed envelopes.
>
> "And so, I might take exception to his statement as to what the police officer's intentions were, but not with the fact that, of course, they did thoroughly examine everything that was in the briefcase, apparently."

The trial court resolved this factual dispute by stating:

> "[T]here was a reasonable basis for inquiry by the party that found it, and secondly by the officers that assisted the party that found it to do two things.
>
> "One, would be the question of whose is it, question of identification. And the second issue would be perhaps a question of — was it dangerous? * * *"

The court then concluded:

> "My view is this: Number one, there was a reasonable — that the action to open the briefcase was reasonable under the circumstances. That no one was aware whose privacy was involved. * * *
>
> "* * * * *
>
> "It will be the ruling that the motion will be denied. * * *"

From the above, it is apparent that the trial court found that the sheriff's deputies had opened the briefcase, first to discover identification and, second, to find out whether

it contained a bomb. Once the deputies had opened the briefcase, the manila envelopes were readily visible. Nothing about the manila envelopes announced their contents. The trial court found that the deputies opened the envelopes in a further attempt to identify the owner of the property. That was reasonable. It was done in pursuit of a statutory, nonprosecutorial objective, not law enforcement. *Compare State v. Bridewell*, 306 Or 231, ___ P2d ___ (1988). The evidence that the deputies found and used to prosecute defendant was not sought in the course of this civil function. *Cf. Nelson v. Lane County*, 304 Or 97, 743 P2d 692 (1987), where the actions were not a part of the police's civil functions. Once the deputies opened the manila envelopes for that legitimate purpose, the contents of the plastic baggies "announce[d] their contents," *see State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986), and no search warrant was necessary for the deputies to deliver the baggies to the crime laboratory for testing. Obviously, the deputies had probable cause to obtain a warrant to open the manila envelopes once they found the weapon, the marijuana and the $9,000. Had the deputies opened the manila envelopes in search of contraband, they would have violated defendant's state and probably federal constitutional rights. However, the trial court found that the deputies were seeking identification and not contraband. That finding is supported by the evidence and is binding upon us. *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968). As such, the opening of the manila envelopes by the sheriff's department was permissible and the trial court properly denied the motion to suppress.

The decision of the Court of Appeals and the judgment of the trial court are affirmed.

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON	)	
	)	
Plaintiff-Respondent, Respondent on Review, Respondent on Reconsideration,	)	ORDER DENYING RECONSIDERATION
	)	CA A40456
v.	)	SC S34991
	)	
THOMAS HENRY PIDCOCK,	)	
	)	
Defendant-Appellant, Petitioner on Review, Petitioner on Reconsideration.	)	

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATED: September 20, 1988

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

copies: Larry R. Roloff
Rives Kistler

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Respondent,

v.

THOMAS HENRY PIDCOCK,
Appellant.

(10-85-09438; CA A40456)

In Banc

Appeal from Circuit Court, Lane County.

Pierre Van Rysselberghe, Judge.

Argued and submitted February 20, 1987; resubmitted in banc December 2, 1987.

Larry R. Roloff, Eugene, argued the cause and filed the brief for appellant.

David Schuman, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

VAN HOOMISSEN, J.

Affirmed.

Buttler, J., dissenting.

Warden, J., dissenting.

VAN HOOMISSEN, J.

Defendant appeals his convictions on two counts of unlawful possession of a controlled substance. ORS 475.992(4)(b). He contends that the trial court erred in denying his motion to suppress evidence. The dispositive issue is whether the trial court's conclusion that defendant had abandoned the evidence and, therefore, had no protectible interest in it is correct. We affirm.

On February 14, 1985, a Mrs. Joll and her daughter Mary were driving toward their residence, just off Crow Road, in Lane County. As they approached the mailbox adjacent to their driveway, they observed what appeared to be a pillow or pillowcase lying near the mailbox. They stopped, and Mary examined the pillowcase and found a black leather briefcase. They took the briefcase to their house and spent several minutes trying to get it open. There was no identification on the exterior. They then called the sheriff and reported finding the briefcase. They were told that ordinarily the sheriff would not respond to someone finding lost property. Joll indicated that this particular briefcase appeared to be somewhat unusual and that it was quite nice and new leather, with combination tumbler locks. It was locked at the time, and there was something heavy inside that was sliding around.

On February 15, 1985, at about 8:30 a.m., Deputy Larson went to the Joll residence and examined the briefcase briefly. He turned the tumblers to zero, which opened the case. Not knowing what was in it, and because there was some type of heavy object sliding around in it, he cracked it open an inch or two so that he could peer inside without fully opening the lid. He observed a large stack of money with a $100 bill on top. He also observed what appeared to be an automatic or semi-automatic handgun, a baggie that appeared to contain marijuana, manila envelopes and some other small items which he could not identify. There appeared to be a wire extending from inside the briefcase to its top.

Because of the wire, Larson called the Eugene Police Department bomb squad to have it examine the briefcase. He thought that it might be booby-trapped. The bomb squad took the briefcase outside the Joll residence and x-rayed it. Readily apparent were a handgun, what appeared to be an extra automatic clip with ammunition, eyeglasses and other indistinct

items. They were not able to determine from the x-rays whether there was an explosive device inside. The briefcase was then opened on one side, and its contents were carefully removed. There were two manila envelopes, one sealed. The glasses were wire-rimmed with a fairly thin black plastic coated substance on the wire, which was the wire Larson had observed. The briefcase was not booby-trapped.

Late that morning, the briefcase and its contents were taken to the sheriff's office. The manila envelopes were opened and examined. No identification of the owner was found. State Crime Lab technician Bekkedahl tested the substances found in the envelopes and determined that they were cocaine and methamphetamine.

After the property was returned to the sheriff's office from the crime lab, the money was determined to be about $9,000. Defendant's fingerprints were found on the envelopes. The weapon was a .45-caliber automatic, fully loaded, which appeared to be in working order.

The sheriff was concerned about the welfare of citizens in the area where the briefcase was found, fearing that someone who had lost it might harass or threaten residents to get it back. Because of that concern, in mid-afternoon of February 15, the news media were invited to come to the sheriff's office for a press conference. On the morning of that day, a telephone call had come to the *Eugene Register-Guard* from a person requesting that a classified ad be placed concerning a briefcase lost in the Crow Road area. That afternoon, a second phone call was received from an adult female who indicated that she wanted the classified ad withdrawn. She asked that the bill be sent to "Tom Pidcock" and she gave defendant's address and phone number.

Further investigation revealed that a number of witnesses would testify that, between 6:00 and 6:30 p.m. on St. Valentine's Day, people had been observed in the Crow Road area driving a vehicle slowly up and down the road apparently looking for something. The vehicle was registered to defendant.

After being advised of the "finders-keepers law," ORS 98.005 *et seq.* Joll placed an advertisement in the *Register-Guard* advertising the finding of the briefcase and how it

could be obtained. She specifically rented a separate post office box for the sole purpose of responses to her advertisement. Other than junk mail, she received no responses. The *Register-Guard* published news stories at least twice between February 16 and February 20 about the briefcase.

The sheriff did not obtain a warrant for the search of the briefcase or of its contents. Defendant testified that he did not intend to abandon the briefcase and that he had called the sheriff's department before the newspapers were called and before the sheriff's office indicated that they had the briefcase in their possession. He said that he did not assert his claim to the briefcase, because he did not want to incriminate himself.

Defendant moved to suppress the briefcase and its contents, relying on Article I, section 9, and the Fourth Amendment.[1] At trial, the parties stipulated that defendant had called the sheriff before the press conference, had then learned that the sheriff had the briefcase and thereafter made no attempt to claim or recover it. The trial court denied the motion. Although it is not entirely clear, the court's *rationale* appears to have been that defendant had specifically abandoned the property.

Defendant contends that the police did not have probable cause to open and search the briefcase. He argues that, before the initial opening by Larsen, there was no evidence that a crime had been committed; that, once the police had opened the briefcase, they needed a warrant to open and search the envelopes; and, that, lacking a warrant, the opening and searching were unlawful. He argues that he did not abandon the briefcase and had attempted to recover it until he learned that it was in the possession of the police. The state argues that defendant had no legitimate expectation of privacy in the briefcase, because he had specifically abandoned it.

Evidence will not be suppressed if the person challenging a search and seizure has abandoned the property.

---

[1] Article I, section 9, provides, in relevant part:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; * * *."

The Fourth Amendment provides, in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

"Society is not prepared to recognize as reasonable—and the constitution does not compel it to recognize as reasonable—any subjective expectation of (or hope for) privacy in abandoned property." *State v. Green*, 44 Or App 253, 260, 605 P2d 746 (1980); *see State v. Hogg*, 7 Or App 99, 104, 490 P2d 198 (1971). Abandonment is the voluntary relinquishment of the possession of an object by the owner with the intention of terminating his or her ownership. The intent to abandon must be clear and must be accompanied by some specific act of abandonment. *See Rich v. Runyon*, 52 Or App 107, 112-13, 627 P2d 1265 (1981).

Defendant did not abandon the briefcase when it fell out of his truck; he was unaware that it had fallen out. He subsequently attempted to find it by searching for it and by ordering a classified ad. However, when he learned that the sheriff had the briefcase, he made no further effort to claim or recover it and discontinued activities already begun. Nothing the police did caused him to forego his interest in the property. He did not know that they had opened the envelopes and had tested their contents. Cancellation of the ad and his failure to undertake any efforts to recover the briefcase were specific acts of abandonment. From the stipulated facts, it is clear that defendant had no intention thereafter of ever asserting any ownership of or interest in the briefcase or its contents.

Defendant argues that any so-called abandonment was done in an effort to avoid self-incrimination and that he cannot be held to have given up his constitutional right against unreasonable searches. We disagree. One who acts to abandon property cannot claim a constitutional violation, even if the act was done to avoid police action. *State v. Green, supra*. Defendant's argument also is contrary to federal authority. *See Abel v. United States*, 362 US 217, 80 S Ct 683, 4 L Ed 2d 668 (1960); *Hester v. United States*, 265 US 57, 44 S Ct 445, 68 L Ed 898 (1924).

Affirmed.

BUTTLER, J., dissenting.

Assuming, *arguendo*, that defendant ultimately abandoned the briefcase, he did not do so until *after* the police had opened the envelopes and tested their contents without a warrant.

The majority, after correctly stating the law of abandonment, goes on to say:

> "Defendant did not abandon the briefcase when it fell out of his truck; he was unaware that it had fallen out. He subsequently attempted to find it by searching for it and by ordering a classified ad. However, when he learned that the sheriff had the briefcase, he made no further effort to claim or recover it and discontinued activities already begun. Nothing the police did caused him to forego his interest in the property. He did not know that they had opened the envelopes and had tested their contents. Cancellation of the ad and his failure to undertake any efforts to recover the briefcase were specific acts of abandonment. From the stipulated facts, it is clear that defendant had no intention *thereafter* of ever asserting any ownership of or interest in the briefcase or its contents." 89 Or App at ____. (Emphasis supplied.)

It is clear from the majority's application of the law that no act of abandonment occurred until the ad was cancelled and defendant thereafter failed to undertake any efforts to recover the briefcase, both of which "specific acts" occurred after the envelopes were opened. The majority has reached the wrong conclusion based on its application of the law to the facts.

Given that defendant did not abandon the briefcase before the critical time, the envelopes remained his effects, and opening them and testing their contents invaded his privacy interest in them. *State v. Owens*, 302 Or 196, 729 P2d 524 (1986). Because there was nothing about the envelopes that "announced their contents," the police were prohibited by Article I, section 9, of the Oregon Constitution from opening them and testing their contents. *State v. Owens, supra.*

Accordingly, I would reverse and remand.

Newman, J., joins in this dissent.

WARDEN, J., dissenting.

When the sheriff's deputy searched the envelopes in defendant's briefcase—the contents of which are the only evidence in dispute—defendant was actively trying to retrieve the lost briefcase and its contents. When he learned that the sheriff had the briefcase, he merely halted his search and maintained a prudent silence. Yet the majority holds that the search did not violate his rights, because he had abandoned all

interest in the briefcase. A respect for reality causes me to dissent.

The majority does not assert that the search of the envelopes was legal if defendant retained any rights in them, and it apparently measures those rights by the common law of property ownership.[1] On that basis, the search violated defendant's rights.

As the owner of the envelopes, defendant had a property interest and a privacy interest in them. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). The deputies' action in seizing and opening the envelopes violated both of those interests. To hold that defendant abandoned the envelopes and may not thereafter challenge that action requires a determination that he abandoned his ownership of them.

To prove that defendant abandoned his ownership of the envelopes, the state had to show that he voluntarily relinquished his possession with the intent of terminating his ownership without vesting ownership in any other person. *Dober v. Ukase Investment Co.*, 139 Or 626, 629, 10 P2d 356 (1932); *Rich v. Runyon*, 52 Or App 107, 112-113, 627 P2d 1265 (1981). An act of abandonment must be "some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership, or inconsistent with any further claim of title or ownership. In other words, an unequivocal and decisive act or acts of relinquishment must be evident." 1 CJS "Abandonment," § 6. (Footnotes omitted.)

The majority does not claim that defendant had made any affirmative act of abandonment before the deputies' search. The facts that the majority recites show the opposite. Thus the search violated defendant's rights *at the time it occurred*. Even if it can be said that defendant *later* abandoned his ownership, the majority gives no basis for holding that he thereby lost his right to challenge the *previous* illegal search, and I can think of none.

In any case, defendant's actions did not constitute an abandonment. There was no affirmative act of repudiation or

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[1] I say "apparently," because the majority cites, but does not clearly rely upon, *State v. Green*, 44 Or App 253, 605 P2d 746 (1980), a case decided under the Fourth Amendment, not under Article I, section 9, of the Oregon Constitution. *See State v. Belcher*, 89 Or App 401, ___, ___ P2d ___ (1988), (Warden, J., dissenting).

relinquishment of ownership in what he did. Once he learned that the police had the briefcase and knew its contents, his choices were to claim his property, at the probable cost of facing criminal charges, or to do nothing. "We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest * * *." *Walter v. United States*, 447 US 649, 658 n 11, 100 S Ct 2395, 65 L Ed 2d 410 (1980) (opinion of Stevens, J.). For all practical purposes, his decision to do nothing was compelled.

Defendant also did not intend to abandon the briefcase. "To equate a passive failure to claim potentially incriminating evidence with an affirmative abandonment of property would be to twist both logic and experience in a most uncomfortable knot." *State v. Joyner*, 66 Hawaii 543, 545, 669 P2d 152 (1983). Defendant did not throw the briefcase away, *see Hester v. United States*, 265 US 57, 44 S Ct 445, 68 L Ed 2d 898 (1924), nor did he dispose of it as trash. *See Abel v. United States*, 362 US 217, 80 S Ct 683, 4 L Ed 2d 668 (1960); *State v. Purvis*, 249 Or 404, 438 P2d 1002 (1968). He simply lost it. Nothing in his later actions showed an intent to abandon it. Canceling the newspaper advertisement and failing to respond to stories about the finding of the briefcase were simply prudent steps to take in the circumstances; they were not acts which unequivocally show an intent to abandon the briefcase, and there is no basis for an inference that he had that intent. The parties stipulated that he would testify that he did not. Even if we assume that the trial court implicitly found that defendant abandoned his property, there is no evidence in the record to support that finding.

Under the majority's reasoning, all the police need to do to avoid the consequences of an illegal search of unattached property, such as baggage or parcels in transit, is to make a public announcement of what they have done and of where the owner can find the illegally searched goods. When the owner, to no one's surprise, does not claim the property, the prosecution can tell the trial court that the owner has abandoned it; under today's decision, the court must accept that as fact. I cannot agree to giving so little meaning to rights which the constitution guarantees.

Therefore, I dissent.